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1                   **DEFENDANTS' OBJECTION TO RICO MAIL & WIRE FRAUD INSTRUCTION**

2                   To be guilty of the predicate act of wire fraud, a “defendant [must have] knowingly  
 3 participated in or devised . . . a scheme or plan for obtaining property by means of false or  
 4 fraudulent pretenses, representations, or promises.” Dkt. 983, Revised Tentative Jury Instructions,  
 5 at 65. But, as this Court has correctly observed, “[i]n order to find ‘a scheme or plan for obtaining  
 6 property,’ one must find that Defendants attempted to ‘acquire money or property through  
 7 fraud.’” See Dkt. 124, Order on Motion to Dismiss, at 9 (citing, e.g., *United States v. Ali*, 620 F.3d  
 8 1062, 1070 (9th Cir. 2010)). To “acquire” means more than merely to “interfere with” or  
 9 “disrupt” a party’s use of its property, but rather that “Defendant have ‘pursued or received  
 10 ‘something of value’ from a Plaintiff ‘that they could exercise, transfer or sell.’” *Scheidler v.*  
 11 *Nat'l Org. for Women*, 537 U.S. 393, 405 (2003) (cited in Dkt. 124 at 9) (citing *United States v.*  
 12 *Nardello*, 393 U.S. 286, 290 (1969)).

13                   On Friday November 8, 2019, Plaintiffs requested until the end of the next day to find and  
 14 present the Court with a case more on point than *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393,  
 15 405 (2003). *See* 20 Trial Tr. 3723:14–19. In this respect, the Court stated:

16                   THE COURT: So I am very much inclined to agree with you, Mr.  
 17 Breen. I will let Mr. Mayer take—see whether there’s something  
 18 else that’s out there, and I’ll look at it. But in rereading things last  
 19 night and also taking a look at what I wrote in the summary-  
 judgment order, I’m just—I’m inclined to agree with you.

20 20 Trial Tr. 3724:15–20. However, Plaintiffs presented no new case by Saturday, and thus have  
 21 waived any further objection to removing the mail and wire fraud instruction. Thus, the Court  
 22 should do so.

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**DEFENDANTS' OBJECTION TO DEFINITIONS OF "CONFIDENTIAL  
COMMUNICATION" AND "ORAL COMMUNICATION" IN JURY  
INSTRUCTIONS**

With respect to the jury instructions, Defendants submit a renewed objection to the Court’s definition of “confidential communication” under the California Recording Statute, and “oral communication” under the federal, Florida and Maryland Wiretapping Statutes. *See* Dkt. 983, at 75 (Cal.), 80 (Fla.), 82 (Md.), 84 (Fed.). Each of those statutes defines the terms in a clear and comprehensible manner:

For the purposes of this section, "confidential communication" means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

Cal. Penal Code § 632(c).

“Oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

Fla. Stat. § 934.02(2).

(i) "Oral communication" means any conversation or words spoken to or by any person in private conversation. (ii) "Oral communication" does not include any electronic communication.

Md. Cts. & Jud. Proc. § 10-401(2).

“oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

18 U.S.C. § 2510(2).

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1 Presently, the instructions for each of the four recording claims has a definition of  
 2 “confidential communication” or “oral communication,” but such definitions do not match the  
 3 statutory definitions. Defendants object to modifying the statutory definition, and suggest the  
 4 following changes:

5 6 <b>Revised Tentative Jury Instructions</b>	5 6 <b>Proposed Text from Statute</b>
7 8 9 10 11 12 13 14 15 16 A conversation is confidential where the recorded party had a reasonable expectation that others are not listening-in to the conversation or recording it.  Dkt. 983, at 75, California Recording Claim. <sup>1</sup>	7 8 9 10 11 12 13 14 15 16 <del>For the purposes of this section, “confidential communication” means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.</del>  Cal. Penal Code § 632(c) (strikethroughs added to show difference between statute and proposed instruction.)
17 18 19 20 An oral communication means a communication uttered by a person who has a subjective expectation that the communication is not subject to interception under circumstances justifying such expectation, and whose expectation was objectively reasonable.  Dkt. 983, at 80, Florida Wiretapping Claim	17 18 19 20 “Oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.  Fla. Stat. § 934.02(2).

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1 Defendants specifically object to the language “listening-in,” which appears in neither the statute, nor the CACI 1809 instruction for Cal. Penal Code § 632.



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